TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 684.

JAMES GRAHAM, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF LOUISIANA, PLAINTIFF IN ERROR,

vs.

E. E. NORTON, ASSIGNEE IN BANKRUPTCY OF ADLER, EASY & CO., ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 10, 1872.

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1 Circuit court of the United States, fifth circuit and district of Louisiana.

JAMES GRAHAM, AUDITOR, PLAINTIFF IN ERROR,
versus
E. E. NORTON, ASSIGNEE IN BANKRUPTCY, DEFENDANT in error. } No. 6514.

Writ of error.—Issued June 23rd, 1871, and received in the U. S. dist. court same day.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, on the relation of Emory E. Norton, assignee, &c., against James Graham, auditor of public accounts of the State of Louisiana, a manifest error hath happened, to the
2 great damage of the said James Graham, auditor, &c., as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the circuit court of the United States for the fifth judicial circuit and district of Louisiana, together with this writ, so that you have the same at New Orleans on the first Monday of November next, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the
3 said Supreme Court of the United States, this 23rd day of June, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] (Signed) D. URBAN,
Clerk of the U. S. Cir. Court for Dist. of L'a.

Citation in error.—Issued by the United States district court, June 23rd, 1871.

United States district court, district of Louisiana.

IN THE MATTER OF E. E. NORTON, ASSIGNEE,
vs.
JA'S GRAHAM, AUDITOR OF PUBLIC ACCOUNTS. } No. 1136. Citation in error.

The United States of America to Emory E. Norton, assignee, greeting:

You are hereby cited and admonished to be and appear before the circuit court of the United States for the fifth circuit and district of Louisiana, to answer the writ of error taken by James Graham, auditor of public accounts, in this cause, and that you show cause then

4 and there, if any there be, why the judgment rendered against the said Graham, auditor, &c., should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. Durell, judge, this 23rd June, in the year of our Lord 1871, and the 95th of the American independence.

(Signed) E. H. DURELL, *Judge.*

Marshal's return of service of above citation.

Received June 21st, 1871, by the U. S. marshal, and on the 26th day of same month and year, served a copy of the within citation in error on E. E. Norton, named herein, by handing a copy of the same to Thomas Hunton, his attorney, at office, cor. Camp and Gravier streets, in this city; said E. E. Norton absent from the State.

New Orleans, June 26th, 1871.

(Signed) S. W. REED,
Deputy U. S. Marshal.

5 TRANSCRIPT FROM THE UNITED STATES DISTRICT COURT.—FILED OCTOBER 7TH, 1871.

In the district court of the U. S. for the district of Louisiana, sitting in bankruptcy. No. 1136.

Petition by E. E. Norton, assignee, vs. *James Graham, auditor* auditor *of public accounts of the State of Louisiana —Filed May 15th,* 1871.

To the Honorable E. H. Durell, judge of the district court of the U. S. for the district of Louisiana. In bankruptcy.

The petition of the United States of America upon the relation of E. E. Norton, assignee in bankruptcy of the bankrupts whose names are set forth in the Document A, annexed hereto as part of this petition, respectfully shows:

That prior to the adjudication in bankruptcy of the several bankrupts, they had each paid to the State of Louisiana the amounts set
6 opposite their respective names, as taxes illegally imposed and collected by the State, under an act of the legislature of the State, approved April 4th, 1865, No. 55 of the session acts of that year.

Petitioner further represents that the legislature of the State of Louisiana, at a recent session, by an act duly approved on the 19th of April, 1871, and which is now a law of the State, declared the illegality of the said taxes, and enacted that the same should be refunded to the parties who paid the same, or to their proper representatives, & that the auditor of public accounts of the State should issue to the said parties, or to their proper representatives, certificates for the amount paid by them.

Petitioners further represent, that, by the operation of law, and by virtue of the assignments to said assignee, E. E. Norton, of all the assets, rights, and interests of the said several bankrupts, the said assignee became entitled to the several amounts illegally collected by the State as aforesaid, and is entitled to receive from the said auditor certificates for the same.

7 That the said Norton, assignee, has demanded said certificates, and that the auditor refused to issue to him or deliver the same, although required by law so to do, to the great injury of the said assignee and of petitioner.

Petitioner further sets forth and avers that the said bankrupts did not surrender their claims, nor did any of them, for the said taxes illegally paid by them, nor were any of the said claims or rights mentioned in the schedules of am'ts filed by the said bankrupts, and that the said assignee had no knowledge whatever of the said claims until about the 1st April, 1871.

Wherefore, petitioner prays that this honorable court will issue a writ of mandamus addressed to James Graham, auditor of public accounts of the State of Louisiana, commanding him to issue and deliver to the said E. E. Norton, assignee of the bankrupts herein named, certificates for the amounts of taxes illegally collected by the State of Louisiana as aforesaid, and otherwise do and perform his duty as auditor as required by said act, approved April 19th, 1871, in the premises, or
8 show cause to the contrary on the 19th day of May, 1871, at 11 o'clock, a. m.

(Signed) TH. HUNTON, *Att'y.*

E. E. Norton being sworn states, the facts and allegations of the foregoing petition are true to the best of his knowledge and belief.

(Signed) E. E. NORTON, *Assignee.*

Sworn to and subscribed before me this 15th day of May, 1871.

(Signed) CHA'S CLAIBORNE, *U. S. Com'r.*

Order of court.

Ordered that copy of this petition be served on James Graham, auditor of public accounts of the State of La., and that he do show cause on the 19th inst., at 11 a. m., why the prayer thereof be not granted.

May 15th, 1871.

E. H. DURELL, *Judge.*

Document A, annexed and made part of this petition.

Amount of taxes paid by the following-named bankrupts under
9 the 3rd section of act No. 55, of the legislature of the State of Louisiana, approved April 4th, 1865, and ordered to be refunded under an act of the legislature approved April 19th, 1871, or the members of said firms:

Adler, Eary & Co		$305
J. M. Alexander		108 72
W. T. Bartley		295 75
Bartley, Johnson & Co		
J. W. Champlin & Co		823 38
Cummings, Brown & Co		7,474 73
J. H. DeBarr & Co		4,088 64
T. J. Herron	643 46	
" " "	514 39	
		1,157 85
Logan, Somat & Claiborne		785 54
Do.		86 15
John L. Lee & Co		716 51
Nixon & Co		2,969 80
S. O. & T. A. Nelson		2,403 48
Do.		546 60

J. J. Person	1,165	56
Do.	234	59
Edy & Pinckard	1,210	51
Do.	93	17
Estlin & Co	532	33
Do.	458	43
F. M. Gould	964	50
C. A. Green & Co	221	42
Simon Loeb & Co	106	98
Tho's M. Scott	100	13
Scott, Cage & Co		
Tho's Henderson	324	
10 Tho's L. White	$125	22
Wyche & Richardson	271	50
Do.	49	60
J. B. Richardson		
J. F. Wyche		
P. H. Foley	825	05
Given, Watts & Co		
Rob't Pitkin	432	24
H. J. Phelps & Co	1,483	13
Do.	169	84
Pilcher & Barrow	2,119	58
Do.	281	50
Richard Power	5,109	27
Do.	720	97
Rosser, Prother & Co	433	85
Do.	41	70
C. W. Allen, Wright, Allen & Co.	4,201	50
N. C. Gullett		
Hughes, Hylested & Co		
Richard Nugent	497	16
M. J. Zuntz	1,326	36
Prother, Caruthers & Co		

Service.

Received, May 16th, 1871, by the U. S. marshal, and on the 19th day of May, served copy of the within citation and petition and order
11 on J. Graham, personally at his office, corner of Royal and Conti streets.

N. O., May 20th, 1871.

S. W. REED,
Dy U. S. M.

MAY 19TH, 1871.

Continued to the 23d, service being insufficient.

Order to produce statement.

MAY 20TH, 1871.

U. S. EX RELATION' E. E. NORTON, ASSIGNEE,
vs.
JAMES GRAHAM, AUDITOR.
} In bankruptcy.

On motion of Tho's Hunton, attorney for petitioner, and considering the affidavit of E. E. Norton, assignee, that the several bankrupts men-

tioned in the petition made no statements in their schedules of the amounts of taxes paid by them, and collected by the State of La., under the 3rd section of the act of the legislature, No. 55, approved April 4th, 1865, and suggesting that petitioner is unable to ascertain the amounts paid otherwise than from extracts taken from the public
12 records in the possession of the auditor.

It is ordered that James Graham, auditor of public accounts, do produce in court, on Tuesday, the 23d of May, 1871, on the trial of the application for a mandamus herein, a statement taken from the books and public records in this office, of the several amounts of taxes collected by the State of Louisiana from the said bankrupts respectively, under and by virtue of the act aforesaid, and in default thereof that the amount' stated in the petition shall be taken and held to be the true amounts so collected.

Order.

Let the statement be produced as prayed for.
May 20th, 1871.
(Signed) E. H. DURELL, *Judge.*

Service.

Rec'd by the U. S. marshal. On the 22d served a copy hereof on Ja's Graham, auditor, personally.

S. W. REED, *D'y U. S. M.*

13 MAY 23RD, 1871.

By consent cause continued to May 30th.
May 30th. No court.

JUNE 1ST, 1871.

Cause re-assigned for 6th June, 1871.

Exceptions and answer.—Filed June 6th, 1871.

U. S. dist. court for the dist. of La.

THE UNITED STATES OF AMERICA, EX REL., E. E. Norton, assignee, *vs.* JAMES GRAHAM, AUDITOR OF PUBLIC ACCOUNTS. } No. 1136.

To the honorable the judge of the district court of the U. S. in and for the district of Louisiana:

Now, into this honorable court, by his counsel, Hornor & Benedict, comes James Graham, auditor of public accounts for the State of Louisiana, upon whom a petition and rule nisi for a peremptory writ of mandamus has been served, commanding him to show cause why he should not issue, in favor of relator, certificates amounting in the ag-
14 gregate to dollars, under and by virtue of act No. 93, approved April 19th, 1871, entitled "An act to reimburse certain taxes illegally imposed and collected under act No. 55, approved April 4th, 1865," for exception to said petition and rule nisi, for cause shows:

1st. That the allegations set forth in the petition of relator do not entitle him to the summary writ of mandamus.

2d. That a writ of mandamus will not lie against a State officer, from a district court of the United States in the exercise of an original jurisdiction.

3rd. That no suit having been instituted and no judgment rendered, the writ of mandamus will not lie against a State officer from a district court.

And in case said exceptions be overruled, then respondent, for answer to said petition, for cause, shows:

1st. That, as an officer of the State of Louisiana, he has sworn to support the constitution thereof; and that, in and by the third
15 amendment thereto, promulgated on the 15th day of December, 1870, it is set forth as follows, to wit:

"ARTICLE . That prior to the 1st day of January, 1890, the debt of the State of Louisiana shall not be so encreased as to exceed twenty-five millions of dollars."

That prior to the 19th of April, 1871, the debt of the State of Louisiana exceeded the sum of twenty-five millions of dollars, and that the annual revenues thereof are insufficient to meet the necessary expenditures and current expenses of said State under the present state of taxation, and will not hereafter be sufficient for such purposes.

That the claims on which the prayer of the relator is based were no part of the debt of the State on said 15th December, 1870, and are not at the present time, and that said claims form no part of the current expenditures for the necessary government of said State or for the maintenance of its peace and order.

That the general assembly of the State of Louisiana was with-
16 out power to pass the said act, in violation of the article of the constitution above set forth, and it is therefore null and void.

Second. That said act No. 93, of 1871, is unconstitutional, and in violation of article No. 114, of the constitution of this State, inasmuch as it sets forth in its title that it is an act to reimburse certain taxes illegally imposed and collected under act No. 55, approved April 4th, 1865; whereas in and by virtue of section first of said act it is provided that all taxes which were collected by the State under the 3rd section of act No. 55 of 1865, shall be reimbursed to the parties who paid the same, and therefore does not express its object in its title, and is null and void.

Third. Your respondent avers that the amount of taxes paid into the treasury under and by virtue of the said 3rd section of the act No. 55 of 1865, amounts to the sum of five hundred and twenty-five thousand four hundred and seventy-five $\frac{88}{100}$ ($525,475.88) dollars;
17 and that the act under which relator claims calls for the reimbursement of said sums to the parties who paid the same, and is therefore indirectly an appropriation exceeding the sum of one hundred thousand dollars, and no means are provided to meet such expenditure, and is in violation of article No. 111 of the constitution of 1868, and in consequence null and void.

Fourth. Respondent further avers, should your honor hold that the act is constitutional and must be enforced, either in whole or in part, that he cannot issue the certificates called for by said act, to be used by said relator or his assigns in paying taxes due the State, to be credited to the general fund, as an amount exceeding the estimated receipts to the "general fund" from taxes had been previously appropriated by law for absolutely necessary expenses for the State government.

Fifth. Respondent further avers, that the parties under whom

18 relator claims never complied with the provisions of said act No. 55 of 1865, or of act No. 25 of 1866, amendatory thereto, in this, viz, that they did not file sworn statements with the auditor of public accounts of the amounts of their sales, either on commission or upon their own account, as required by the provisions of said acts, and they are therefore, by their own wrong, debarred from claiming any relief, and none can be claimed by relator.

Sixth. That said 3rd section of said act of 1865 was legal and binding upon all persons who paid taxes thereunder upon property owned by residents of this State, as well as by non-residents whose property had become incorporated with the property of citizens of this State; and that the said act was and is legal and binding upon all persons who paid taxes thereunder upon property, the product of this State, whether owned by residents or non-residents, and the general assembly was without power to refund taxes so paid, to the injury of other

19 tax-payers of said State.

Seventh. That in so far as said act of 1871, No. 93, orders the reimbursement of taxes legally collected, it constitutes a donation to individuals for their own private purposes, which donation the legislature is incompetent to make.

Eighth. Respondent specially denies that the persons under whom relator claims are entitled to the benefit of said act No. 93 of 1871. He denies that they paid said tax; and, if paid, which is denied, that they paid the same with their own funds, and charged themselves therewith; and respondent is informed and believes, and so charges, that in every case where said tax was paid upon the sales of merchandize belonging to persons residing out of the State, that said tax was charged against such non-residents, and retained out of the proceeds of sale of such merchandize, and the same does not belong to the parties named

20 by relator, but to their various consignors.

Ninth. Respondent further denies that relators are entitled to relief, as the sums paid by them into the treasury of the State of Louisiana, if any, were paid upon assessment made according to law, without objection and without protest; that such assessment cannot now be contradicted or altered by relator, and that such sums so covered into the treasury cannot be withdrawn, directly, or indirectly, except in case of a specific appropriation previously made, setting forth the amount, the purpose, and the mode of payment.

Tenth. Respondent specially denies that relator has any power or authority to represent the persons whose names are set forth in his petition, or that relator is the lawful appointed assignee of the persons whom he pretends to represent.

21 Wherefore your respondent prays that the petition of relator be dismissed, and his application for a writ of mandamus denied with costs.

And he prays for all general relief in the premises.

(Signed) S. BELDEN, *Att'y-General.*

(Signed) HONOR & BENEDICT,
Of counsel.

James Graham, being duly sworn, says that all the facts and allegations set forth in the foregoing answer, of his own information, are true and correct, and those set forth on the information of others he believes to be true.

(Signed) JA'S GRAHAM.

Sworn to and subscribed before me this 23d day of May, 1871.
(Signed) H. LOEW, *U. S. C.*

Certificate of James Graham, auditor, filed 26th June, 1871.

STATE OF LOUISIANA, AUDITOR'S OFFICE,
New Orleans, June 6th, 1872.

22 I, Ja's Graham, auditor of public accounts for the State of Louisiana, do hereby certify that the amount of money called for by the act of the general assembly of the State of Louisiana, approved April 19th, 1871, being No. 93 of the session acts, entitled an act to reimburse certain taxes illegally imposed and collected under act No. 55, approved April 4th, 1865, to be reimbursed to certain parties who paid the same, is the sum of $525,475.90.

And I do further certify that the records of my office do not show what parties paid the same, or any part thereof.

In faith whereof I hereto sign my name and affix my seal as auditor aforesaid, this day and date above written.

[SEAL.] (Signed) JA'S GRAHAM, *Auditor.*

Hearing of cause—June 6th, 1871.

23 E. E. NORTON, ASSIGNEE, *vs.* J. GRAHAM, AUDITOR. } 1136.

This cause came up for trial—Tho's Hunton for assignee; Honor & Benedict for Graham—when, after hearing the pleadings and the evidence, it is ordered that the solicitors argue the question by briefs.

Extract from the minutes—Note of evidence.

June 6th, 1871.

Assignee offered in evidence all the deeds of assignments in the cases named in Document A annexed to the petition.

Memo. by clerk.

The records of the court show that E. E. Norton is the assignee in all the cases mentioned in Document A.

Judgment—June 21st, 1871.

24 E. E. NORTON, ASSIGNEE, *vs.* JA'S GRAHAM, AUDITOR. } 1136.

For reasons orally assigned by the court it is ordered, that a writ of mandamus issue herein as prayed for, and that James Graham, auditor of public accounts of the State of Louisiana, do issue certificates as required by the act of the legislature of the State of Louisiana, approved April 19th, 1871, No. 93, to E. E. Norton, assignee in bankruptcy of the several bankrupts and bankrupt firms mentioned in the petition and the document attached, for the several amounts paid by them respectively, and collected by the State of Louisiana from them under the 3rd

section of an act of the legislature of 1865, approved 4th April, 1865, or for such sums and amounts as appears from the records of the treasurer or auditor's office to have been collected by the State under
25 the act aforesaid of April 4th, 1865.

Writ of mandamus.—Issued June 22, 1871.

UNITED STATES OF AMERICA:

District court of the U. S., dist. of Louisiana.

IN THE MATTER OF E. E. NORTON, ASSIGNEE, *vs.* JAMES GRAHAM, AUDITOR. } 1136.

The President of the United States to James Graham, auditor of public accounts of the State of Louisiana, greeting:

You are hereby commanded, in the name of the United States of America, and of our said district court, to issue forthwith to E. E. Norton, assignee in bankruptcy of the hereinafter, named bankrupts and bankrupt firms, certificates as required by the act of the legislature of the State of Louisiana, approved April 19th, 1871, No. 93, for
26 the several amounts paid by said bankrupts, respectively, and collected from them as taxes, by the State of Louisiana, under the provisions of the 3rd section of an act of the legislature of said State, approved April 4th, 1865, No. 55, as hereinafter set out, to wit:

Adler, Earey & Co	305
J. M. Alexander	108 72
W. T. Bartley	295
Bartley, Thompson & Co	
J. W. Champlin & Co	823 38
Cummings, Brown & Co	7,474 73
S. H. DeBow & Co	4,088 64
F. J. Herron	643 46
Do.	514 39
Logan, Somat & Claiborne	785 54
Ditto	86 15
John L. Lee & Co	716 61
Nixon & Co	2,969 80
S. O. & T. A. Nelson	2,403 48
Do.	546 60
J. J. Person	1,165 56
Do.	234 59
Edy & Pinckard	1,210 51
Do.	93 17
Estlin & Co	532 33
Do.	458 43
J. M. Gould	964 58
C. A. Green & Co	221 42
27 Simon Loeb & Co	106 98
Tho's M. Scott	100 13
Scott, Cage & Co	
Tho's L. White	125 22
Wyche & Richardson	271 50
Do.	49 60
J. B. Richardson	

J. O. Wyche	
P. H. Toly	825 05
Given, Watts & Co	
Rob't Pitkin	432 24
H. J. Phelps & Co	1,483 13
Ditto	169 84
Pielcher & Barrow	2,119 58
Ditto	281 50
Richard Power	5,109 27
Ditto	720 97
Rosser, Prother & Co	433 85
Ditto	41 70
C. W. Allen	
Wright, Allen & Co	4,201 50
M. J. Zuntz	1,326 36
N. C. Gullett	
Hughes, Hyllested & Co	
Prothro, Caruthers & Co	

or such other sums as shall appear from the books of the treasurer or auditor's office, to have been paid by the parties.

28 Witness the Hon. E. H. Durell, judge of our said court, at New Orleans, this 22d day of June, 1871.

[SEAL.] (Signed) CH'S CLAIBORNE, *Clk.*
Per K. LOEW, *D'y Clk.*

Service.

Rec'd by the U. S. marshal, and on the 22d day of June, 1871, handed a copy hereof to Ja's Graham, auditor, who read the same, and handed it back to me after having read it.

(Signed) S. W. REED, *D'y U. S. M.*
JUNE 26TH, 1871.

Petition for writ of error. Filed June 23rd, 1871.

UNITED STATES OF AMERICA, IN THE RELATION of E. E. Norton, assignee,
vs.
JAMES GRAHAM, AUDITOR. } 1136.

U. S. district court for the district of Louisiana.

29 To the Hon. Edw'd H. Durell, judge of the district court of the United States, for the district of Louisiana:

The petition of James Graham, auditor of public accounts, of the State of Louisiana, shows, with respect: That in the decree herein entered on 21st June, 1871, taking jurisdiction of the cause and making peremptory the writ of mandamus applied for, manifest error appears, to his great prejudice, as he is informed and believes, and he is anxious of being granted a writ of error therefrom to the hon. the circuit court of the United States, holding sessions in the fifth judicial circuit and district of Louisiana, at its next term, to be holden in the city of New Orleans on the first Monday of November next.

Wherefore he prays a writ of error, to operate as a supersedeas herein, be granted him, returnable in the next circuit court for this
30 district. on the first Monday of November next, on his giving bond, with surety, according to law, in the sum of five hundred

dollars, and that plaintiff and relator herein be cited to appear and make answer thereto; and he prays for all general relief.

(Signed) HONOR & BENEDICT,
Atty's for Def't.

NEW ORLEANS, *June 22d*, 1871.

Order.

Let a writ of error be granted herein, to operate as a supersedeas in behalf of defendant, returnable to the circuit court of the United States for the fifth judicial circuit and district of Louisiana, on the first Monday of November next, on his giving bond, with surety, according to law, in the sum of sixty-five thousand dollars.

New Orleans, June 23rd, 1871.

(Signed) E. H. DURELL, *Judge.*

31 *Bond.—Filed July 1st*, 1871.

Know all men by these presents, that we, James Graham, auditor of public accounts of the State of Louisiana, as principal, and John J. Adams, John B. Heno, A. Chiapella, H. Gally, James Jackson, L. F. Generes, E. Rigney, E. A. Tyler, A. Carriere, and C. H. Slocomb, as sureties, are held and firmly bound unto the United States, Emory E. Norton assignee, and Ch's Claiborne, clerk, and all others in interest in the full and just sum of sixty-five thousand dollars, ($65,000,) to be paid to the said party or parties, their certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 30th day of June, in the year of our Lord, 1871.

Whereas lately at a district court of the United States in and
32 for the district of Louisiana, in a suit depending in said district court wherein the United States, in the relation of E. E. Norton, assignee, is plaintiff, and James Graham, state auditor, defendant, jdugment was rendered against the said James Graham, auditor, defendant, and the said Ja's Graham, auditor, having obtained a writ of error and filed a copy thereof in the clerk's office of the said district court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States on the relation of Emory E. Norton, assignee, citing and admonishing him to be and appear at a circuit court of the United States, to be holden at New Orleans the first Monday of November next.

Now the condition of the above obligation is such that if the said James Graham, State auditor, shall prosecute his writ to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JAMES GRAHAM, [SEAL.]
Auditor.

33 (Signed) J. J. ADAMS, [SEAL.]
(Do.) JOHN B. HENO. [SEAL.]
(Do.) A. CHIAPELLA.
(Do.) H. GALLY.
(Do.) JAMES JACKSON.
(Do.) L. F. GENERES.
(Do.) E. RIGNEY.
(Do.) E. A. TYLER.
(Do.) A. CARRIERE.
(Do.) C. H. SLOCOMB.

Signed, sealed, and delivered in the presence of—
(Signed) W. L. CAMPBELL.
(Do.) W. P. RICHARDSON.

Clerk's certificate.

District court of the United States for the district of Louisiana.

I certify that the foregoing (39) pages do contain and form a correct and complete transcript of the record wherein E. E. Norton, assignee in bankruptcy, is plaintiff, and James Graham, auditor of public accounts for the State of Louisiana, is defendant, embracing all the proceedings, and documents filed, instituted in this court under the
34 No. 1136 of the bankruptcy docket.

In faith whereof I grant these presents under my hand and the seal of our said court, at New Orleans, this 14th August, 1871.

[SEAL.] (Signed) K. LOEW,
D'y Clk.

PROCEEDINGS IN U. S. CIRCUIT COURT.

Assignment of error.—Filed March 13th, 1872.

U. S. circuit court.

GRAHAM *vs.* NORTON. } No. 6514.

Graham, auditor, assigns for error.

1st. That the allegations set forth in the petition of relator do not entitle him to the summary writ of mandamus.

2d. That a writ of mandamus will not lie against a State officer from a district court in the exercise of an original jurisdiction.

35 3rd. That no suit having been instituted, and no judgment rendered, the writ of mandamus will not lie against a State officer from a district court.

4th. The act of 1871 is unconstitutional, as it creates a debt in conflict with the La. cons. & amendment of 8th November, 1870.

5th. That no case appears on the record for a writ of mandamus.

(Signed) HONOR & BENEDICT,
Att'y for Pl't'ff in Error.

Hearing and submission of causes—Extract from minutes, November term, 1871.

NEW ORLEANS, *Wednesday, March 13th*, 1872.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, presiding judge.

JAS. GRAHAM *vs.* E. E. NORTON, ASS'EE. } No. 6514.

36 This cause was called for trial—Honor & Benedict for J. Graham, pl't'ff in error; Tho's Hunton for def'd't in error—when

the counsel for Graham having filed assignment of error, the cause was argued on both sides, and the court took time to consider.

Order cause reinstated and to be argued.—Extract from the minutes, March 28th, 1872.

JAS. GRAHAM, AUDITOR, *vs.* E. E. NORTON, ASSIGNEE. } 6514.

Ordered that the cause be reinstated for further argument on Tuesday 2d April, at 11 a. m., and that all parties in interest be notified thereof.

**Motion to dismiss writ of error.—Filed April 2d, 1872.*

U. S. EX REL., E. E. NORTON, *vs.* JAMES GRAHAM, AUDITOR.

This reference approved.

1st. The relator moves to dismiss the writ of error in this case, because this court is without jurisdiction; no debt or damages to the amount of $500.00 being claimed, or awarded by the judgment of the district court.

2d. Because the writ & citation in error do not state the names of the parties, the citation being addressed to E. E. Norton, assignee.

3d. Because there is no legal assignment of errors, & no bill of exceptions in the record, & no error apparent.

(Signed) THOS. HUNTON,
*For Relator.**

Argument on the motion to dismiss writ of error.—Extract from minutes, April 2d, 1872.

JAS. GRAHAM, AUDITOR, *vs.* E. E. NORTON, ASSIGNEE. } 6514.

37 This cause came up for further argument pursuant to order.

Honor & Benedict for pl't'ff in error.
Tho's Hunton, for def'd't in error.

And after hearing argument on the motion now made by the defendant in error to dismiss, and argument upon the merits of the cause, the court allowed the pl't'ff in error a further delay of days to file authorities.

Final decree.—Judgment-book.

Circuit court of the United States, fifth circuit and district of Louisiana. November term, 1871.

NEW ORLEANS, *Thursday, April 4th*, 1872.

Court met pursuant to adjournment—present, Hon. W. B. Woods, presiding judge.

JAMES GRAHAM, AUDITOR,
vs.
E. E. NORTON, ASSIGNEE. } 6514.

For reasons orally assigned by the court, it is ordered and
38 decreed that the decree rendered by the district court on June 21st, 1871, be affirmed. And it is ordered, adjudged, and decreed by this court, that a writ of mandamus issue herein as prayed for, and that James Granam, auditor of public accounts for the State of Louisiana, do issue certificates, as required by the act of the legislature of the State of Louisiana, approved April 19th, 1871, No. 93, to E. E. Norton, assignee in bankruptcy, of the several bankrupts and bankrupt firms mentioned in the petition, and the document attached, for the several amounts paid by them respectively, and collected by the State of Louisiana from them under the 3rd section of an act of the legislature of 1865, approved April 4th, 1865, or for such sums and amounts as appears from the records of the treasurer or auditor's office to have been collected by the State from said bankrupts, under acts aforesaid of 4th April, 1865.

Decree rendered April 4th, 1872.
Decree signed April 5th, 1872.
(Signed) W. B. WOODS, *Judge.*

39 *Petition for writ of error, and order allowing the same.—Filed April 5th, 1872.*

In the U. S. circuit court, dist. of La.

UNITED STATES OF AMERICA EX REL. E. E. Norton, assignee, &c.,
vs.
JAMES GRAHAM, STATE AUDITOR. } No. 6514.

To the honorable judges of the U. S. circuit court, fifth circuit and district of Louisiana.

The petition of James Graham, auditor of public accounts for the State of Louisiana, shows, with respect—

That he has been informed and believes there is error to his prejudice in the final decree herein rendered on the 4th April, 1872, and signed on 5th April, 1872; that he is aggrieved thereby, and is desirous of being granted a writ of error therefrom to the hon. Supreme Court of the United States, at its next term.

Wherefore he prays a writ of error, to operate as a supersede-
40 deas, be granted him, returnable to the Supreme Court of the United States, on the first Monday of December next, on his giving bond in such sum as the court may direct, conditioned according to law, and that citation in error be served, as the law directs.

And he prays for all general relief.
New Orleans, April 5th, 1872.
(Signed) HONOR & BENEDICT,
Att'ys for Pl'tff in Error.

Order.

Let a writ of error be granted herein, to operate as a supersedeas, returnable to the Supreme Court of the United States on the first Mon-

day in December next, on plaintiff in error giving bond according to law in the sum of five hundred dollars.

New Orleans, April 5th, 1872.

(Signed) W. B. WOODS, *Judge.*

Bond for writ of error.—Filed April 5th, 1872.

JAMES GRAHAM, AUDITOR, PLAINTIFF IN error,
vs.
E. E. NORTON, ASSIGNEE, DEFENDANT IN error.
} No. 6514.

41 Know all men by these presents, that we, James Graham, auditor of public accounts of the State of La., as principal, and Andrew Hero, jr., of the parish of Orleans, as surety, are held and firmly bound unto E. E. Norton, assignee in bankruptcy, of Adler, Eary & Co., and others, F. A. Woolfley, clerk, and all others in interest, in the full sum of five hundred ($500) dollars, to be paid to the said E. E. Norton, assignee, &c., and others, their certain attorney, executors, administrators, or assigns. To which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this fifth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas, lately at a circuit court of the United States, fifth judicial, circuit holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein James Graham, State auditor is plaintiff, and E. E. Norton, assignee, &c., is defendant, judg-
42 ment was rendered against the said James Graham, auditor, plaintiff, and the said James Graham, State auditor, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. E. Norton, assignee, &c., citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next.

Now, the condition of the above obligation is such, that if the said James Graham, State auditor, shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JAS. GRAHAM, [L. S.]
Auditor.

(S'g'd) ANDREW HERO, JR. [L. S.]

Sealed & delivered in the presence of—

(S'g'd) F. A. WOOLFLEY, *Clerk.*

Approved April 5th, 1872.

(Signed) W. B. WOODS, *Judge.*

43 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States, for fifth circuit and district of Louisiana, do hereby certify, that the foregoing 42 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of James Graham, auditor,

plaintiff in error, vs. E. E. Norton, assignee in bankruptcy, defendant in error, No. 6514 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 6th day of August, A. D. 1872.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

[5-ct. int. rev. stamp, canceled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify, that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 6th day of August, A. D. 1872.

E. H. DURELL, *Judge.*

[5-ct. int. rev. stamp, canceled.]

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between James Graham, auditor of public accounts of the State of Louisiana, plaintiff in error, and E. E. Norton, assignee in bankruptcy of Adler, Eary & Co and others, defendant in error, a manifest error hath happened, to the great damage of the said James Graham, auditor of public accounts of the State of Louisiana, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fifth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6514. James Graham, State auditor, plaintiff in error, versus E. E. Norton, assignee & defendant in error. Writ of error. Filed April 5th, 1872, F. A. Woolfley, clerk.

45 THE UNITED STATES OF AMERICA,
District of Louisiana :

The President of the United States to Emery E. Norton, assignee in bankruptcy of Adler Easy & Co., J. M. Alexander & Co., W. T. Bartley, Bartley, Johnson & Co., J. W. Champlin & Co., Cumings, Brown & Co., S. H. De Bow & Co., F. I. Heron, Logan, Souiat & Claiborne, John L. Lee & Co., Nixon & Co., S. O. & T. A. Nelson, J. J. Perron, Edey & Pinckard, Estlin & Co., J. M. Gould, C. A. Green & Co., Simon Loeb & Co., Tho's M. Scott, (Scott, Cage & Co.,) Tho's L. White, Wyche & Richardson, J. B. Richardson, J. F. Wyche, P. H. Foley, Given, Watts & Co., Thomas Henderson, Robert Pitkin, H. J. Phelps & Co., Pilcher & Barrow, Richard Power, Rosser, Prothro & Co., C. W. Allen, (Wright, Allen & Co.,) M. J. Zuntz, (Prothro, Caruthers & Co.,) N. C. Gullett, (Hughes, Hylestead & Co.,) Richard Nugent, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein James Graham, auditor of public accounts of the State of Louisiana, is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said pl'ff in error as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

W. B. WOODS, *Judge.*

46 (Indorsed :) United States circuit court. No. 6514. James Graham, pl'ff in error, vs. E. E. Norton, assignee & Co., def't in error. Citation.

Marshal's return.

Received Ap'l 5, '72, by the U. S. marshal, and on the 15th day of April, 1872, served a copy hereof on Emery E. Norton, assignee in bankruptcy of the within named persons and firms by handing the same to him in person, at his office, No. 17 Exchange alley in this city, New Orleans.

S. W. REED,
D'y U. S. Marshal.

APRIL 22, '72.

On this 22d day of April, 1872, personally appeared before me, the subscriber S. W. Reed, and makes oath that he served a copy of the within citation as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me—

F. B. VINOT,
D'y Clk.

(Indorsement on cover :) No. 684. James Graham, auditor of public accounts of the State of Louisiana, plaintiff in error, vs. E. E. Norton, assignee in bankruptcy of Adler, Easy & Co., et al. Lousiana C. C. U. S. Filed 10th September, 1872.

IN THE HONORABLE THE

Supreme Court of the United States.

December Term, 1871.

JAMES GRAHAM, Auditor of Public Accounts of the State of Louisiana, Plaintiff in Error,
vs.
E. E. NORTON, Assignee in Bankruptcy of Adler, Easy & Co., et al.

No. 684.

In error to the Circuit Court of the United States for the District of Louisiana.

BRIEF OF COUNSEL OF PLAINTIFF IN ERROR.

I.—Abstract of the Case.

On the 15th of May, 1871, E. E. Norton filed a petition in the United States district court for the State of Louisiana, praying for a writ of mandamus against James Graham, auditor of public accounts of that State.

Petition. See Rec., pp. 2 and 3.

Norton alleges himself to be assignee in bankruptcy of certain bankrupts, whose names appear on a list filed as an exhibit with his petition as document A, and found at pp. 3 and 4 of the record.

He avers that before the several parties named in said list

had been declared bankrupts, they had each paid to the State of Louisiana the amounts set opposite to their names respectively in the document A, "as taxes illegally imposed and collected by the State, under an act of the legislature of the State, approved April 4, 1865."

He avers, further, that the legislature of the State had then recently, by an act approved 19th of April, 1871, declared the illegality of said taxes, and enacted that the same should be refunded to the parties who paid the same, or to their proper representatives, and that the auditor of public accounts of the State should issue to the said parties, or to their proper representatives, certificates of the amount paid by them.

He furthers avers that by operation of law, and the assignments of all the assets, rights, and interests, to petitioner, of the said bankrupts, he is entitled to the several amounts illegally collected by the State, and is entitled to receive from the auditor certificates of the same; which the auditor refuses to issue to him.

He avers, further, that the bankrupts did not surrender said claims, nor were they mentioned in their schedules, and that petitioner knew nothing of them until about 1st April, 1871.

He prays for a mandamus, ordering the auditor of public accounts to deliver to petitioner, as assignee in bankruptcy of the persons and firms mentioned in document A, certificates for the amount of taxes illegally collected by the State of Louisiana and to perform all such other acts as may be required of him by the act of the legislature of Louisiana, approved 19th April, 1871.

See petition, Rec., pp. 2 and 3.

The document annexed to the petition contains the names of thirty-nine individuals and firms, of which seven are in

blank as to amount, and the aggregate of the others is $45,-248.24.

See Rec., pp. 3 and 4.

The auditor of public accounts was ordered to show cause on the 19th May, 1871, why the prayer of the petitioner should not be granted.

See Rec., p. 3, middle.

This gave the auditor only four days, but the petition and citations were really not served upon the auditor until the 19th May, the day on which he had been ordered to show cause.

See return of U. S. marshal, Rec., p. 4.

A continuance was granted of four days, until 23d.

See Rec., p. 4.

On the 20th May, the counsel of the petitioner, Norton, obtained an order from the district court directing the auditor of public accounts of the State to produce in court, on the 23d of May, a statement from the books and records of his office of the several amounts of taxes collected by the State of Louisiana, from the said bankrupts respectively, under and by virtue of the act aforesaid, *i. e.*, April 4, 1865.

See Rec., pp. 4 and 5.

The cause was assigned for the 6th June, 1871, when the auditor filed an exception and answer.

Return to mandamus, exception, and answer, Rec., pp. 5 to 7.

For cause of exception he urged—

1. That the allegations of Norton's petition did not entitle him to a writ of mandamus.

See Rec., p. 5, foot.

2. That a mandamus does not lie from district court of the United States to a State officer in the exercise of an original jurisdiction.

3. That no suit having been instituted, and no judgment rendered, a mandamus will not lie against a State officer from a district court.

See Rec., p. 6.

In case these exceptions should be deemed insufficient, the auditor said by way of answer:

1. That by the third amendment to the constitution of Louisiana it is provided, that prior to the 1st of January, 1890, the debt of the State of Louisiana shall not be so increased as to exceed twenty-five millions of dollars.

That prior to the 19th April, 1871, the date of the act relied on by petitioner, the debt of the State of Louisiana had already exceeded twenty-five millions of dollars; that the revenues were insufficient to meet the necessary expenses and current expenses of the State under the present taxation.

That the claims set up by petitioner were no part of the debt of the State on the 15th December, 1870, when the above-named constitutional amendment was adopted, and are not such at the present time, and that said claims are no part of the current expenses of the State.

Hence, that the act of the legislature relied on by petitioner was null and void for violation of the constitution.

Rec., p. 6, folio 15.

2. That the act of the legislature of Louisiana of 19th April, 1871, relied on by petitioner, is null and void, as not setting forth its object in its title, as required by article 114 of the constitution.

3. That the amount of taxes paid into the treasury by

the act of April 4, 1865, was $525,475.88; that the act under which petitioner claims reimbursement is an appropriation act, and is in violation of art. 111 of the constitution, as it appropriates more than $100,000, without providing means to meet the expenditure.

4. That the auditor cannot issue the certificates called for by the petitioner, to be used in paying taxes due to the State, to be credited to the general fund, as an amount exceeding the estimated receipts to the general fund had been previously appropriated by law for the necessary expenses of the State.

See Rec., p. 6.

5. That the parties under whom the petitioner claims never complied with the provisions of the act of April 4, 1865, or with those of the act of 1866 amendatory thereof, and can therefore claim no relief, nor can any be claimed by petitioner.

6. That the provisions of the act of April 4, 1865, were binding on all persons who paid taxes under it, and said taxes cannot be refunded, to the injury of the other taxpayers of the State.

7. That the act of April 19, 1871, is a donation to private individuals, which the legislature has no right to make.

8. The auditor denies that the persons whom the petitioner represents are entitled to the benefit of the act of 19th April, 1871; he denies that they paid the taxes; and avers that if they did pay them, they deducted them out of the proceeds of property they sold on commission, and therefore had no title, individually, to reimbursement.

9. That the taxes in question were paid into the treasury without protest or objection; and the petitioner cannot contradict the assessment; and that the moneys so paid into the treasury cannot be withdrawn without a specific appropriation in each case, which has not been made.

10. Denies the authority of petitioner to represent the persons he claims to act for.

See Rec., p. 7.

Judgment of District Court.

The district court on 21st June, 1871, for reasons not found in the transcript, ordered that a writ of mandamus issue as prayed for, and that James Graham, auditor of public accounts of the State of Louisiana, issue certificates, as required by the act of the legislature of 19th April, 1871, to E. E. Norton, assignee in bankruptcy of the several bankrupts mentioned in his petition and the document attached, for the several amounts paid by them and collected by the State of Louisiana, under the 3d section of the act of 4th April, 1865.

See Rec., pp. 8 and 9.

On this an order went out, in the name of the President of the United States, to the auditor, to issue the certificates.

Rec., p. 9.

The cause was then removed on the application of the auditor of public accounts, by writ of error, to the circuit court, to effect which the auditor was required by the judge of the district court to furnish bond and security in the sum of $65,000.

See the order and bond, Rec., pp. 11 and 12.

Assignment of Errors in Circuit Court of Louisiana.

In the circuit court, three grounds of error were assigned by the auditor:

1. That the allegation set forth in the petition of the relator do not entitle him to the summary writ of mandamus.

2. That a writ of mandamus will not lie against a State

officer from a district court in the exercise of an original jurisdiction.

3. That no suit having been instituted, and no judgment rendered, the writ of mandamus will not lie against a State officer from a district court.

4. The act of 1871 is unconstitutional, as it creates a debt in conflict with the Louisiana constitution and amendment of 8th of November, 1870.

5. That no case appears on the record for a writ of mandamus.

See Rec., p. 12.

The cause was argued in the circuit court on the 13th of March, 1872, (see Rec., pp. 12 and 13,) and on the 28th of March, 1872, reinstated for further argument.

See Rec., p. 13.

On the 2d of April, 1872, the relator, Norton, moved to dismiss the writ of error:

1. Because no debt or damages to the amount of $500 was claimed.

2. Because the writ and citation did not name the parties, the citation being addressed to E. E. Norton, assignee.

3. Because there was no legal assignment of errors, no bill of exceptions in the record, and no error apparent.

See Rec., p. 15.

On the 2d of April, 1872, argument was heard on the motion to dismiss case and on the merits.

See Rec., p. 15.

On the 4th April the circuit court gave judgment against the auditor of public accounts, ordering a writ of mandamus against the auditor, commanding him to issue certificates, as required by the act of the legislature of the State of Louis-

iana, approved April 19, 1871, to E. E. Norton, assignee in bankruptcy of the several bankrupts mentioned in the petition and the documents attached, for the several amounts paid by them respectively, and collected by the State of Louisiana from them, under the 3d section of an act of the legislature of 1865, approved April 4, 1865.

See Rec., p. 14.

From this judgment the auditor of public accounts of the State of Louisiana has sued out a writ of error to this court, which was allowed as a supersedeas on a bond of $500.

See Rec., pp. 14 and 15.

II.—The Plaintiff in Error Relies on the following Assignment of Errors.

First. The court below erred in taking jurisdiction of the case, since it is substantially an action against the State of Louisiana.

Second. The court below erred in exercising jurisdiction over a State officer, by mandamus, in the first instance.

Third. The court below erred in making the mandamus peremptory, because the duty imposed upon the auditor of the State of Louisiana by the act of the legislature of April 19, 1871, sheet acts No. 93, was one which, to execute, required deliberation, discretion, and judgment, and was not a mere ministerial act.

Fourth. The court erred in ordering a peremptory mandamus, because the alleged duty of the State auditor, which petitioner sought to compel him to perform, was not one of a clear and indisputable character; the right of petitioner was at the best doubtful, and the claim was controverted by the auditor.

Fifth. The assignee in bankruptcy, setting aside, *argumenti gratia*, for the present, all other considerations, is not entitled to the certificates he prays for, and the court below erred in ordering the auditor of the State of Louisiana to issue the certificates to Norton, assignee of the various bankrupts whose names appear on the list annexed to his petition, because the assignee is entitled only to the property of the bankrupts vested in them at the time they are declared such, and at that time they were neither legally nor equitably entitled to these certificates.

III.—Brief of Argument.

On the First Assignment.

To illustrate the relation of the parties, let us examine the acts of the legislature of Louisiana which are brought in question; and firstly—

No. 55. An act to provide for increasing the revenue of the State, and raise means to pay the interest on the State debt.

Section 3. *Be it further enacted, &c.*, That there shall be assessed and collected the sum of one-quarter of one per cent. on the annual gross sales or receipts of each and every person pursuing any trade, profession, or occupation, whose annual receipts exceed the sum of two thousand dollars.

SIMEON BELDEN,
Speaker of the House of Representatives.
LOUIS GASTINEL,
Lieutenant-Governor, and President of the Senate.

Approved April 4, 1865.

J. MADISON WELLS,
Governor of the State of Louisiana.

A true copy:

S. WROTNOWSKI,
Secretary of State.

Secondly, look at—

No. 93. An act to reimburse certain taxes illegally imposed and collected under act No. 55, approved April 4, 1865.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That all taxes which were collected by the State, under the third section of an act entitled "An act to provide for increasing the revenue of the State and raise means to pay the interest on the State debt," approved April 4, 1865, shall be, and are hereby, refunded to the parties who paid the same, or to their proper representatives, and the auditor of public accounts be, and he is hereby, authorized and required to issue to said parties, or to their proper representatives, certificates for the amount paid by them, which shall be receivable by all State tax-collectors in payment of the general fund tax.

Section 2. *Be it further enacted*, &c., That this act take effect from and after its passage.

(Signed,) GEO. W. CARTER,
Speaker of the House of Representatives.

(Signed,) OSCAR J. DUNN,
Lieutenant-Governor, and President of the Senate.

Approved April 19, 1871.

(Signed,) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:

GEORGE E. BOVEE,
Secretary of State.

The object of the assignee's (Norton's) petition is to compel the auditor of the State of Louisiana to issue such certificates as are spoken of in the second act, which, when issued, will be receivable in payment of State taxes.

The auditor is without any personal interest in the matter; it concerns the State alone; it is simply and exclusively a question of State debt and State taxation. The certificates are evidence of State indebtedness, and if issued will pass to the tax-collector in the stead of money; hence the State of Louisiana is directly interested.

The State, as a being merely intellectual, acts through individuals, its officers; and whenever the officer is acting in pursuance of a State law, valid in itself, and not in conflict with the Constitution and laws of the United States,

then and in such case the action of the officer is the action of the State; he is in that respect the State itself.

Governor of Georgia *vs.* Madrazo, 1 Peters, 123.

Graham, the auditor, having no personal interest in the matter, the State, though not nominally, is substantially the defendant.

See the opinion of Washington, J., in Fowler *vs.* Miller, 3 Dallas, p. 412.

See opinion of Marshall, J., in U. S. *vs.* Peters, 5 Cranch, p. 139.

The object of the adoption of the eleventh amendment was to protect the State from the suit of individual creditors; it was intended for those cases in which some demand is made by an individual in the courts of the Union. A general interest might well be felt in leaving a State full power of consulting its convenience in the adjustment of its debts, *or other claims upon it.*

Cohen *vs.* Virginia, 6 Wheaton, p. 407.

And the case at bar seems to come completely within the definition given on the next page.

By a suit commenced by an individual against a State, we should understand process sued out against the State, for the purpose of establishing some claim against it by the judgment of a court.

Same, p. 408.

In the case before you, Norton commences a suit for the sole purpose of establishing a right he claims against the State of Louisiana.

Chancellor Kent says in his Commentaries, vol. 1, pp. 296 and 297, explaining why the 11th amendment was adopted, that the States were not willing to be arraigned as defendants before the Federal courts at the instance of private persons, *be the cause of action what it may.*

The record does not disclose whether Norton was a citizen of Louisiana or not.

If a citizen of another State or an alien, and the suit be substantially against the State of Louisiana, it is beyond the judicial power of the United States by the 11th amendment; if a citizen of Louisiana the case is still clearer against him.

On the Second Assignment.

By the act of the 2d of March, 1867, (14 Stat. at Large, p. 517,) to establish a uniform system of bankruptcy throughout the United States, it is provided in the first section, on page 518, "The said district courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity."

In speaking of the writ of mandamus, Clifford, J. said, in delivering the opinion of the court: "None of the circuit courts in the several States can issue the writ as an exercise of original jurisdiction, any more than this Supreme Court."

See Riggs *vs.* Johnson county, 6 Wallace, p. 189.

In the case at bar, the jurisdiction over the State auditor was sought to be acquired and enforced by means of the writ, which was not issued in a case where the jurisdiction had already attached; and this court has said in the case just quoted that no such jurisdiction exists.

See Riggs *vs.* Johnson county, 6 Wallace, p. 189, at top, and the cases there quoted.

Strong, J., in delivering the opinion of the court, said: "There is, then, no act of Congress which has conferred upon circuit courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary

for the exercise of the jurisdiction conferred upon them by law."

See Bath county *vs.* Amy, 13 Wallace, p. 250.

Third Assignment.

The act of the Louisiana legislature, relied upon by the petitioner in the court below, is entitled "An act to reimburse certain taxes *illegally* imposed and collected," &c., but by the terms of the body of the act, *all* the taxes levied and collected under the preceding act are to be refunded to the parties who paid the same, or their proper representatives.

The auditor of public accounts is to issue to said parties, or their proper representatives, certificates for the amount paid by them.

When application is made to the auditor for a certificate, he must examine and ascertain whether such applicant have paid a tax levied under the third section of the act of April 4, 1865; whether the party applying is the same who paid; or if a representative, then whether his powers are sufficient; other questions may arise for determination, all of which cannot be predicted.

Questions might and necessarily would arise then for determination such as suggested by the answer and return to the order to show cause why a mandamus should not issue, made by the auditor, as to whether the act of 19th April, 1871, did not violate art. 111 of the Louisiana constitution, and the amendment of 15th December, 1870, limiting the State debt.

See Rec., p. 6.

This is not the case of a specific appropriation of a certain sum to an individual named, where the act of the auditor would be merely ministerial.

See the United States *vs.* Guthrie, 17 Howard, 304, and the cases there cited.

United States *vs.* Johnson, 4 Wallace, 498.

Fourth Assignment.

To support which counsel relies on the following authorities:

See Board of Commissioners *vs.* Aspinwall, 24 Howard, 383.

Riggs *vs.* Johnson County, 6 Wallace, p. 193.

United States *vs.* Guthrie, 17 Howard, 284.

Fifth Assignment.

By the second section of the bankrupt act, the circuit and district courts have jurisdiction of suits brought by the assignee against any person claiming an adverse interest, touching any property or rights of property of said bankrupt transferrable to or vested in such assignee.

See 14 U. S. Statutes at Large, p. 518.

As soon as the assignee is appointed and qualified, the register conveys to him all the bankrupt's property and estate, real and personal, the assignment dating back to the commencement of the proceedings.

Sec. 14, p. 522.

And the assignee has the same authority to claim or sue for the property, debts, or effects of the bankrupt, as the bankrupt might have done.

Same section.

The assignee's petition (see Rec., p. 3, at top) shows that the donation of the Louisiana legislature was made to the bankrupts after the assignment, was purely personal,

and the gift conveyed no title or right which can be claimed by the assignee.

See Bump's Bankruptcy, New York, fifth ed., pp. 323 *et seq.*, and the authorities there quoted.

The judgment of the lower court should be reversed.

Respectfully submitted.

THOMAS J. DURANT,
Of Counsel of Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1872.

JAMES GRAHAM, Auditor of the State of Louisiana, plaintiff in error,
vs.
E. E. NORTON, assignee in bankruptcy, &c.
} No. 684.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

Origin and History of the Case.

In April, 1865, the Legislature of the State of Louisiana passed an act to the following effect: "*That there shall be assessed and collected the sum of one quarter of one per cent. on the annual gross sales or receipts of each and every person pursuing any trade, profession, or occupation, whose annual receipts exceed the sum of two thousand dollars.*"

The enforcement of this statute was resisted by certain merchants of the city of New Orleans. An appeal was taken to the courts, and the Supreme Court of the State for very obvious reasons declared the act of the Legislature unconstitutional, and relieved the parties contesting from the payment of the tax imposed.

Meanwhile large amounts of this unconstitutional tax had been paid into the State treasury, and the Legislature, in 1871, animated by a sense of justice as commendable as it has been rare in that State in recent years, resolved to refund to the parties who had paid the same, or to *their proper*

representatives, the taxes thus illegally collected, as had been declared by its highest court. And the auditor of the State was "required to issue to the said parties or to their proper representatives, certificates of the amounts paid by them."

See acts of Legislature, pp. 9–10 of brief of counsel for plaintiff.

E. E. Norton, as the assignee in bankruptcy of divers bankrupts who had paid these taxes, applied for a mandamus in the United States district court to compel the auditor to issue to him certificates for the amounts paid by the several bankrupts.

The district court granted the order.

A writ of error to the circuit court was taken by the auditor. The decree of the district court was affirmed, and the auditor has brought the case to this court.

After the writ of error was allowed by the circuit judge, a motion to dismiss was made, but not disposed of.

On behalf of defendant in error it is now submitted that this case should be dismissed, on the following grounds:

1st. That this Court is without jurisdiction. This case originated in the bankrupt court of Louisiana. It is brought here by writ of error from the circuit court. The jurisdiction of this Court is limited, in such cases, to revising final judgments in cases at law, or suits in equity, where the debt or damages claimed, or the matter in dispute, exceeds the sum or value of $2,000. (9th section of Bankrupt law. Morgan *vs.* Thornhill, 11th Wall, p. 76.)

Now it nowhere appears in the record that the matter in dispute exceeds in value $2,000. The "dispute" here is simply whether the Auditor shall issue to certain parties certificates of what amount of taxes they paid under a certain law, or not.

The ultimate value of these certificates, or whether (when issued) they will ever be received for taxes, are questions not now involved.

The sole matter in dispute is, whether the Auditor shall

obey the law of his State, and issue the certificates—and this question has no appreciable value in money.

Indeed, it is admitted, p. 11 of the brief of the counsel of plaintiff in error, that "Graham, the Auditor, has no interest in the matter."

This admission would seem to be fatal, since there is no other party plaintiff. (5th How., 103;) (1 Black., 271.)

2d. The case should be dismissed because the writ of error is fatally defective in not naming all the parties. The writ was sued out as against "Norton, assignee of Adler, Easy & Co., and *others*." Such a description of the parties has always been held insufficient. (12 How., 327, and numerous cases cited in Phillips' Practice, 2d edit., p. 62.)

This defect in the writ was attempted to be cured by inserting in the citation the names of all the parties.

But the "citation must follow the writ." The clerk is not authorized to amend a writ signed by the judge, by naming in the citation parties not named in the writ.

On either of the above grounds, it is submitted the case should be dismissed. I proceed to consider the assignment of errors in this court and the argument of counsel thereon.

The first error alleged, is, that the court below erred in exercising jurisdiction, since the case is substantially an action against the State of Louisiana.

In support of this position, three cases are cited. Neither of them sustains the position assumed.

In the case in 1st Peters, 123, the Governor of Georgia was sued in his official character of governor, for undertaking to carry into effect a law of the State which he was specially directed to execute.

Here, Graham, the auditor, is proceeded against, because he refuses to perform a ministerial act which the law of the State required him to do. The cases are wholly dissimilar.

Norton, it is said, "commences a suit for the sole purpose of establishing a right he claims against the State of Louisiana." The fact is just the reverse. The State, speaking

through her Legislature, concedes the right. There is not, nor can there be, any necessity for a suit against the State, (if such a thing were possible,) because the State has granted what is demanded here and directed the auditor to issue the certificates.

The second case cited in support of the position, that Graham, auditor, is the State of Louisiana, is from 3d Dallas, 412. This was an action for land, and the court said the State has nothing to do with the contest and is *not* a party.

The case of United States *vs.* Peters, (5 Cranch, 139,) was a mandamus against Judge Peters, the district judge of Pennsylvania, to compel him to execute one of his own judgments. The mandamus issued. If that case had any application to the case before the Court, it would be against the plaintiff in error, but I cannot perceive its applicability. So that unless it be assumed that the auditor of the State of Louisiana is the State itself, it must be considered that the State is not directly or indirectly a party to this suit.

The conclusion of the argument on the first assignment, that if Norton, assignee, is a citizen of Louisiana he could not sue in the Federal court, cannot be maintained, I think. The bankrupt court is always open to the assignee for the collection of the assets in bankruptcy.

The Second Assignment.

If the jurisdiction of this court is maintained this assignment presents in my judgment the only serious question in the case.

The general doctrine that the writ of mandamus cannot constitute the basis of jurisdiction in the United States courts is fully conceded. The circuit courts have repeatedly issued the writ of mandamus against State officers, but only after jurisdiction acquired by suit and judgment, and when the writ became necessary to enforce the judgment.

In the case of Bath county *vs.* Amy, 13 Wall., cited by counsel, the mandamus was refused because Amy had no

judgment on the coupons which he held, but applied for the writ simply upon presentment of his coupons for interest.

In Norton *vs.* Graham the case is far different.

The bankrupt court is, by the 1st section of the act, charged with the "collection of all the assets," marshaling the same, &c., &c., and empowered to make all necessary orders. Its powers and jurisdiction with reference to the effects of the bankruptcy are as broad and comprehensive as language could make them. The intention of Congress obviously seems to have been that the assignees might always enforce their rights in the district courts, without the necessity of ever being driven into the State tribunals.

Now, while a jurisdiction *first acquired* by suit in a circuit court is necessary to authorize a mandamus by such court on a State officer, yet, by virtue of the special jurisdiction conferred by the bankrupt act upon the district court in bankruptcy proceedings, its express duty to collect the assets and the plenary power to take all steps necessary thereto, it seems clear that the special jurisdiction conferred as fully and clearly warrants the issuance of a mandamus by the district courts as does the jurisdiction of a circuit court, acquired by suit, authorize the latter court to issue the writ.

This case differs, however, in most essential features from any reported case in which the writ of mandamus has been applied for. In the cause against "Lee county," and similar cases, cited in Riggs *vs.* Johnson, and with which the Court is familiar, the obligors on the bonds refused to pay, or to provide for the payment of, the interest claimed as due. Of course the courts could not assume the fact that the bonds were valid and the interest due, and hence the necessity of a judicial establishment of the claimant's right, before the Court would grant the writ.

In this case, however, there can be no necessity for a suit. The party who is to pay (the State of Louisina) acknowledges our right, recognizes the fact that it collected money unlaw-

fully, desires to refund it, and directs its auditor to issue certain certificates for amounts illegally paid.

There was nothing to be accomplished by a suit primarily. The Legislature of the State had directed its proper officer to issue certain certificates, for amounts which had been paid into the treasury, to the parties, or their representatives, who had paid the same.

The State could not be sued. The only course left for the assignee was the one adopted. He could only deal with a refractory State officer, who denied the constitutionality of a law of the State, by asking for a mandamus.

Third assignment.

It is insisted that, with regard to the issuance of the certificates as required of the auditor by the act of the Legislature of April, 1871, the auditor's duty was plainly and solely ministerial and not judicial. Every act of every officer requires the exercise of some judgment and discretion.

In the supposed case put by the counsel for Graham, (Brief, p. 131,) of a "specific appropriation of a certain sum to an individual named," the payment of such sum it is admitted would be merely a ministerial act.

And yet precisely the difficulties suggested here would have to be met in the supposed case. The auditor would have to inquire whether the party claiming the sum appropriated was the individual named, or if the amount was claimed by a legal representative, his powers and authority would have to be passed upon; but in no case, it is urged, has the auditor, when specially required to do a specific act, the right to question the constitutionality of the statute which requires him to perform the act. If such were the case, then, indeed, would he be the State; he could stop the wheels of government at any moment.

Fourth and Fifth Assignments.

The duty of the auditor was plain and easily performed.

The answer filed (Rec., 6 and 7) discloses what mistaken notions this officer entertained of his duties.

As to the questions of fact involved in these assignments, they have all been found in favor of the relator in the lower courts, and the record does not come up in such shape as to allow any inquiry here touching them. It is urged, as a matter of objection to the judgments below, that it does not appear that Norton showed that as assignee he was entitled to the claims.

The petition of Norton states he became apprised of the existence of the claims about the 1st of Apil, 1871. The petition was filed May 15, 1871. *Non constat*, but that amended schedules and surrenders were made between those dates, or that Norton acquired the claims by special assignment.

However, we insist that these issues of fact cannot be tried here.

If the position contended for, that this is substantially a suit against the State, is to derive any weight from the fact that the name of the attorney general is signed to the answer of the auditor, I beg the court to observe that the record shows he was never present at any trial; that he did not sign as attorney for the State; that he did not join in the petition for a writ of error to the circuit court, did not participate in any proceedings in the circuit court, and hence acquiesced in the judgment of the district court as a finality.

It is respectfully submitted that the writ of error should be dismissed on the grounds hereinbefore set forth, and that if this court takes jurisdiction of the case, the judgment should be affirmed.

THOS. HUNTON,
Attorney for Defendant in Error.